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For Whom the Bell Tolls: Tolling State Statutes of Limitations and the Constitutionality of 28 U.S.C. § 1367(d)

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FOR WHOM THE BELL TOLLS: TOLLING STATE STATUTES OF LIMITATIONS AND THE CONSTITUTIONALITY OF 28 U.S.C. § 1367(d)

I. INTRODUCTION

In the 1989 case *Finley v. United States*[1] the Supreme Court rejected an assertion of pendent party jurisdiction but suggested that Congress could constitutionally authorize such jurisdiction. In 1990, Congress responded to the Court by passing 28 U.S.C. § 1367. The statute allows the federal courts to exercise jurisdiction over certain state law claims between citizens of the same state when those claims are properly joined with a claim over which the federal court has original jurisdiction.[2] Congress also added subsection (d) to the statute in order to provide for situations in which the claim giving the court original jurisdiction is dismissed.[3] Subsection (d) tolls the state statute of limitations while the federal action is pending and for at least thirty days after the claim is dismissed. Therefore, a party is not stripped of a remedy in state court for a state claim simply because the federal claim it was joined with was dismissed and the federal court has declined to exercise jurisdiction over the remaining state claims.

Section 1367(d) is integral to the success of supplemental jurisdiction. This Comment will demonstrate that § 1367(d) is a necessary and proper regulation of federal practice and procedure and that the Supreme Court should uphold the statute as constitutional. Part II introduces the supplemental jurisdiction statute, discusses the reasons for its enactment, and more specifically outlines the purpose of § 1367(d). Part III explores the case law that interprets and questions the constitutionality of subsection (d). Part IV further analyzes the statute in terms of policy concerns and constitutionality. It addresses criticisms of the statute and explains why the author feels the statute is constitutional. In addition, this Comment will also explain why the Supreme Court should find § 1367(d) constitutional as applied to a private party.

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1. 490 U.S. 545.
2. *See* 28 U.S.C. § 1367(a) (2000).
3. *See infra* note 97 and accompanying text.

II. BACKGROUND

A. Problems with Federal Court Jurisdiction Spurring the Adoption of § 1367

As early as 1824 in *Osborn v. Bank of the United States*[4] Chief Justice John Marshall found that not all issues in an action must depend on federal law in order for the case to arise under the laws of the United States.[5] Instead, the Supreme Court held that Article III only requires that the cause of action contain some federal "ingredient."[6] The Court declared that "when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or law may be involved in it."[7] *Osborn*'s whole-case approach to federal jurisdiction gave rise to pendent and ancillary jurisdiction.

Over a century after *Osborn*, the Court reaffirmed the doctrine of pendent jurisdiction when it held in *United Mine Workers v. Gibbs*[8] that federal jurisdiction extends to cases and controversies and not simply to claims.[9] The Court declared that, if the state and federal claims are derived "from a common nucleus of operative fact" and the federal issues are substantial, then "there is *power* in federal courts to hear the whole."[10] Thus, the doctrine of pendent jurisdiction allowed plaintiffs to join a federal question claim with related state claims over which the court had no independent subject matter jurisdiction.[11] Similarly, the doctrine of ancillary jurisdiction allowed a defendant in federal court to assert a related claim or crossclaim or join a party over which the court had no independent subject matter jurisdiction.[12] Ancillary jurisdiction was reaffirmed in *Moore v. New York Cotton Exchange*,[13] in which the Court found such jurisdiction when the claim

4. 22 U.S. (9 Wheat.) 738.
5. *Id.* at 821-22.
6. *Id.* at 823.
7. *Id.*
8. 383 U.S. 715 (1966).
9. *Id.* at 725.
10. *Id.*
11. *See generally* Siler v. Louisville & Nashville R.R. Co., 213 U.S. 175 (1909) (developing the doctrine of pendent claim jurisdiction).
12. *See generally* Freeman v. Howe, 65 U.S. (24 How.) 450, 460 (1860) (holding that the plaintiffs could assert their claims in federal court, despite having no independent basis for subject matter jurisdiction because their claim was "ancillary and dependent . . . to the original suit").
13. 270 U.S. 593 (1926).

sought to be joined arose from the same transaction as the claim giving the federal courts subject matter jurisdiction.[14]

However, the Court did not discuss a requirement of congressional authorization in order for the federal courts to hear pendent and ancillary claims until *Aldinger v. Howard*[15] and *Owen Equipment & Erection Co. v. Kroger*.[16] In these cases, in order for a federal court to have proper jurisdiction, the Court required that Congress had not "expressly or by implication negated" consent to hear the claims sought to be joined with a jurisdictionally sufficient claim through the doctrines of pendent or ancillary jurisdiction.[17] The Court once again reiterated in *Finley v. United States*[18] that "'[t]he Constitution must have given to the court the capacity to take [jurisdiction], *and an act of Congress must have supplied* [the jurisdiction].'"[19] In explaining its decision, the Court noted that what it found "of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts."[20] However, the Court also pointed out that the result of its decision could be easily altered through congressional action.[21] In response, Congress passed 28 U.S.C. § 1367, which grants federal courts statutory authority to hear most pendent and ancillary claims that are now known as supplemental jurisdiction.[22]

B. The Supplemental Jurisdiction Statute

The statute codified at 28 U.S.C. § 1367 gives the federal courts congressional authority to hear claims that would not ordinarily be within the courts' jurisdiction, but which can be heard if they form part of the same "case or controversy" as a claim that is within the courts'

14. *Id.* at 609.
15. 427 U.S. 1 (1976).
16. 437 U.S. 365 (1978).
17. *Aldinger*, 427 U.S. at 18; *Kroger*, 437 U.S. at 373 (quoting *Aldinger*, 427 U.S. at 18).
18. 490 U.S. 545 (1989).
19. *Id.* at 548 (citations omitted).
20. *Id.* at 556.
21. *Id.* ("Whatever we say regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress.").
22. *See* 28 U.S.C. § 1367 (2000).

original jurisdiction.[23] This authority was deemed supplemental jurisdiction.[24]

Subsection (a) of the statute formally gives the federal district courts jurisdiction of these claims, but subsection (b) makes exceptions to this general grant of jurisdiction in particular circumstances in which the courts' original jurisdiction is based on diversity jurisdiction.[25] In subsection (c) of the statute, Congress lists instances in which a court may decline to exercise supplemental jurisdiction over a claim it has received pursuant to subsection (a).[26] Subsection (d) then ensures that a state claim will not be lost if the federal claim is dismissed simply because the limitations period ended while the federal action is pending. Subsection (d) states as follows:

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23. *See* 28 U.S.C. § 1367(a). The subsection reads:
> Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

24. *See* § 1367.

25. Subsection (b) reads:
> In any civil action in which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

26. Subsection (c) provides:
> The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if–
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> (1) the claim raises a novel or complex issue of State law,
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> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
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> (3) the district court has dismissed all claims over which it has original jurisdiction, or
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> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

> The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

Thus, subsection (d) works to ensure that a claim, which is timely and properly filed, is not lost simply because jurisdiction is now improper under subsection (a). Without subsection (d), plaintiffs could not bring supplemental state claims to federal court without fear that those claims could be lost if the claim giving a federal court original jurisdiction is dismissed. Therefore, without subsection (d), much of the purpose of supplemental jurisdiction would be aggravated.

III. CASE LAW DEVELOPMENT OF § 1367(d)

The case law discussing the tolling statute is scarce but interesting. The only United States Supreme Court decision to interpret § 1367(d) is *Raygor v. Regents of the University of Minnesota*.[27] However, because this case was complicated by an Eleventh Amendment state immunity defense, the question of the tolling statute's constitutionality was left undecided.[28] Shortly after *Raygor*, the South Carolina Supreme Court was faced with a similar question. In *Jinks v. Richland County*[29] the court held that § 1367(d) is unconstitutional when applied to the State or its political subdivisions.[30] The South Carolina Supreme Court is the only court that has addressed the constitutionality of § 1367. However, the United States Supreme Court granted certiorari on October 21, 2002 to review the court's decision in *Jinks* and will hear the case in this term.[31]

A. Raygor v. Regents of the University of Minnesota

For several years, the tolling provision of § 1367(d) went virtually unnoticed amidst the criticism of the other provisions of the

27. 534 U.S. 533 (2002).
28. *See infra* Part III. A.
29. 349 S.C. 298, 563 S.E.2d 104 (2002), *cert. granted*, 123 S. Ct. 435 (2002).
30. *Id.* at 304, 563 S.E.2d at 107.
31. *See* 123 S. Ct. 435 (2002).

supplemental jurisdiction statute.[32] However, the U.S. Supreme Court was faced with its first challenge to the tolling provision in 2001. In *Raygor* the Court held that the tolling provision is inapplicable when applied to claims filed in federal courts against nonconsenting states.[33] The plaintiffs in *Raygor* had raised state and federal claims against the University of Minnesota, an arm of the state, in federal district court.[34] The district court granted the defendant's motion to dismiss all claims for lack of subject matter jurisdiction because of its Eleventh Amendment immunity.[35] Three weeks later, the plaintiffs refiled their state law claims in state court.[36] The defendant then moved to dismiss them, asserting that the claims were barred by the applicable statute of limitations.[37] In addition, the defendant argued that § 1367(d) did not apply because the federally sufficient claim was barred by the Eleventh Amendment, and, therefore, the federal court never actually had subject matter jurisdiction over the claims.[38] The state court granted the defendant's motion on these grounds and the plaintiff appealed.[39]

The Minnesota Court of Appeals reversed the lower court, holding that the defendant's Eleventh Amendment defense did not strip the federal district court of its underlying original jurisdiction and § 1367(d) should therefore apply to equitably toll the plaintiff's claim.[40] The Supreme Court of Minnesota reversed,[41] finding that the "application of section 1367(d) to toll the statute of limitations applicable to state law claims against an unconsenting state defendant first filed in federal court but then dismissed and brought in state court is an impermissible denigration of the University's Eleventh Amendment immunity."[42]

Finally, the United States Supreme Court affirmed the Minnesota Supreme Court's judgment "on the alternative ground that the tolling provision does not apply to claims filed in federal court against nonconsenting States."[43] The Court found that the defendant never

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32. *See infra* note 84-85 and accompanying text.
33. 534 U.S. 533, 548 (2002).
34. *Id.* at 537.
35. *Id.*
36. *Id.* at 538.
37. *Id.* at 538.
38. *Id.*
39. *Raygor*, 534 U.S. at 538.
40. Raygor v. the Univ. of Minn., 604 N.W.2d 128, 134 (Minn. Ct. App. 2000).
41. Regents of the Univ. of Minn. v. Raygor, 620 N.W.2d 680, 688 (Minn. 2001).
42. *Id.* at 687.
43. *Raygor*, 534 U.S. at 536.

consented to suit in federal court because it first raised the Eleventh Amendment defense in its answers and also because the defendant had not "'unequivocally expressed' a consent to be sued in federal court."[44] The Court relied on the clear statement principle of statutory construction, requiring Congress to make its intention to alter the traditional constitutional state and federal balance "unmistakably clear in the language of the statute."[45] Thus, after finding that § 1367(d) contained no specific legislative intent to abrogate the states' sovereign immunity, the Court found that the tolling statute simply was not intended to apply to dismissals of claims against nonconsenting states.[46] Although the Court declined to directly address whether the federal tolling of a state statute of limitations constitutes an unconstitutional infringement on state sovereign immunity, the Court commented "that the notion at least raises a serious constitutional doubt."[47] Justice Ginsburg wrote the concurring opinion in which she stressed her belief "that statutes should be construed so as to avoid difficult constitutional questions,"[48] and did not believe the Court should discuss other possible scenarios where § 1367(d) might apply.[49]

Justices Stevens wrote the dissenting opinion and was joined by Justices Breyer and Souter.[50] In the dissent's view, the tolling provision of § 1367 displayed the legitimate and important "federal interest in the fair and efficient administration of justice."[51] The dissent further argued that "the Court's Eleventh Amendment jurisprudence concerns the question *whether* an unconsenting sovereign may be sued, rather than *when* a consenting sovereign may be sued."[52] Therefore, because the State had consented to be sued in its own courts under the state statute that provided a state claim, the application of the tolling statute does not affect the state's Eleventh Amendment immunity.[53] The dissent concluded that, because the State waived its immunity by authorizing a state claim, the tolling provision ought to apply as it would to a private party.[54] However, because the

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44. *Id.* at 547 (citations omitted).
45. *Id.* at 541 (citations omitted).
46. *Id.* at 546.
47. *Id.* at 543.
48. *Id.* at 549 (quoting Vt. Agency of Natural Res. v. United States, 529 U.S. 765, 787 (2000)).
49. *Raygor*, 534 U.S. at 549.
50. *Id.*
51. *Id.*
52. *Id.* at 552.
53. *See id.*
54. *Id.* at 553-54.

majority found that the State had not waived its Eleventh Amendment immunity by giving a claim and setting a statute of limitations, the majority opinion addressed only the question of statutory construction to find that Congress did not intend for the tolling provision to apply to nonconsenting state defendants.

B. *The South Carolina Supreme Court Decision of* Jinks v. Richland County

The *Raygor* Court did not directly address the constitutionality of § 1367(d). However, two months after *Raygor,* the Supreme Court of South Carolina took up the question in *Jinks v. Richland County.*[55] In *Jinks* the plaintiff brought an action in federal court alleging violations of 42 U.S.C. § 1983, as well as supplemental claims under the South Carolina Tort Claims Act.[56] The district court granted summary judgment on the § 1983 claims and declined to exercise supplemental jurisdiction under the remaining state claims, dismissing them without prejudice pursuant to 28 U.S.C. § 1367(c)(3).[57] When the plaintiff refiled the state claims in state court, the defendant asserted that the claims were barred by the two year statute of limitations.[58] In response, the plaintiff asserted that the tolling provision of § 1367(d) preserved the claims.[59] The defendant then argued that, even if the tolling provision of § 1367(d) applied, it nonetheless violated the Tenth Amendment[60] by infringing on South Carolina's sovereign immunity.[61]

The South Carolina Supreme Court held that § 1367(d) is unconstitutional as applied to the states and their political subdivisions in tort actions.[62] The court used a two part inquiry to analyze the question of whether the statute violated the Tenth Amendment.[63] First, the court asked whether the Constitution gives Congress the power to enact such a statute as one of its enumerated powers.[64] The court

55. 349 S.C. 298, 563 S.E.2d 104 (2002), *cert. granted,* 123 S. Ct. 435 (2002).

56. *Id.* at 301, 563 S.E.2d at 105. The South Carolina Tort Claims Act is codified at S.C. CODE ANN. § 15-78-10 to -200 (Law. Co-op. 2001).

57. *Jinks,* 349 S.C. at 301, 563 S.E.2d at 105. The Court of Appeals affirmed the district court in *Jinks v. McCaulley,* 163 F.3d 598 (4th Cir. 1998).

58. *Jinks,* 349 S.C. at 301, 563 S.E.2d at 105.

59. *Id.* One should note that *Raygor* had not been decided when *Jinks* was first heard.

60. U.S. CONST. amend. X (reserving for the states and the people any powers not expressly delegated to the federal government).

61. *Jinks,* 349 S.C. at 302, 563 S.E.2d at 106.

62. *Id.* at 304, 563 S.E.2d at 107.

63. *Id.* at 303, 563 S.E.2d at 106.

64. *Id.* (quoting United States v. Johnson, 114 F.3d 476, 480 (4th Cir. 1997)).

concluded that, by virtue of Article III of the United States Constitution and the Necessary and Proper Clause, Congress has the power to enact laws that govern the judicial power of the federal courts, including rules of practice and procedure.[65] The court then discussed the second prong of the inquiry: whether, despite Congress's constitutional power to regulate federal jurisdiction, the means by which the statute regulates that jurisdiction still "impermissibly infringe[s] upon state sovereignty."[66] In determining this question, the court discussed whether the statute was both necessary and proper to govern the practice and procedure of the federal courts.[67] After finding that § 1367(d) is "a useful 'aid to the exercise of federal jurisdiction,'" the court concluded that the statute met the constitutional definition of necessary.[68]

However, the court found that the statute was not proper within the meaning of the Necessary and Proper Clause because it "interferes with the State's sovereign authority to establish the extent to which its political subdivisions are subject to suit."[69] The court reasoned that states have the right to decide *whether* they may be sued in their own courts as a matter of sovereignty.[70] "In addition, the State may determine the *conditions* under which it consents to suit," and the statute of limitations is one such condition.[71] Therefore, the South Carolina Supreme Court concluded that the State had consented to suit for only a limited time through the South Carolina Tort Claims Act and that § 1367(d) is an unconstitutional violation of the Tenth Amendment when applied against a state or its political subdivisions because it effectively extends the time in which a state may be sued without the state's consent.[72]

C. Jinks *as an Extension of* Raygor

Although the South Carolina Supreme Court presumably took its cue from the *Raygor* Court, the *Jinks* decision was actually a significant extension of *Raygor*. It is true that the *Raygor* Court did allude to doubts regarding the constitutionality of the tolling provision.[73] However, the majority also appeared intentionally to

65. *Id.* (citing Hanna v. Plumer, 380 U.S. 460 (1965)).
66. *Id.* (quoting United States v. Johnson, 114 F.3d 476, 480 (4th Cir. 1997)).
67. *Jinks*, 349 S.C. at 303-04, 563 S.E.2d at 107.
68. *Id.* at 304, 563 S.E.2d at 107 (citation omitted).
69. *Id.*
70. *Id.* at 305, 563 S.E.2d at 108 (citations omitted).
71. *Id.* (citations omitted).
72. *Id.* at 306, 563 S.E.2d at 108.
73. *See supra* text accompanying note 47.

refrain from deciding the constitutionality of the statute, explicitly expressing the limits of the holding twice in its opinion.[74] In addition, Justice Ginsburg's concurring opinion stressed the limits of the holding and her belief that the Court should not "venture further into the mist surrounding § 1367."[75] The Court's deliberate caution and reiteration of the limited nature of the ruling indicates that the constitutionality of the tolling provision is far from clear. The Court's emphasis on the limited nature of its holding may indicate that at least some Justices would rule differently if the constitutionality of the tolling provision was challenged by private defendants.

Raygor and *Jinks* can most easily be distinguished by the reasoning used in each. In finding that the statute did not apply to unconsenting state defendants, the *Raygor* Court focused on interpreting the statute in a way that avoided the larger constitutional question.[76] However, because of the shift in facts, the court in *Jinks* could not avoid the constitutional issues and was forced to use a Tenth Amendment analysis.[77] As a result, though the *Jinks* decision extended the judgment of *Raygor*, its holding was not an extension of *Raygor's* reasoning. Therefore, it does not necessarily follow from *Raygor* that the U.S. Supreme Court will use reasoning similar to *Jinks* when it faces the question this term.

To further add to the uncertainty of how the Court will rule, three dissenting Justices in *Raygor* would not find § 1367(d) unconstitutional.[78] Justice Stevens pointed to other federal tolling statutes that also apply to state limitations periods.[79] He believes the state statutes are preempted by the Supremacy Clause[80] and, though, like any federal preemption, the tolling provision of § 1367(d) may "'affect[] the federal balance,'"[81] it does not "'constitut[e] an abrogation of state sovereign immunity.'"[82] It naturally follows from this reasoning that, if § 1367(d) is constitutional when applied to a

74. Raygor v. Regents of the Univ. of Minn., 534 U.S. 533, 543, 547 (2002).

75. *Id.* at 549.

76. *See supra* notes 43-49 and accompanying text.

77. *See supra* notes 58-72 and accompanying text.

78. *See supra* notes 50-54 and accompanying text.

79. *See Raygor*, 534 U.S. at 551 n.7 (citing 11 U.S.C. § 108 ("tolling during bankruptcy"); 50 U.S.C. app. § 525 ("tolling during military service"); 15 U.S.C. § 6606(e)(4) ("tolling during notice and remediation period for Year 2000 related claims"); and 42 U.S.C. § 9658 ("setting uniform limitations-period commencement date in suits under state law for damages due to hazardous release exposure")).

80. U.S. CONST. art. VI, cl. 2.

81. *Raygor*, 534 U.S. at 554 (Stevens, J., dissenting) (quoting the *Raygor* majority at 544).

82. *Id.* (alteration in original).

state defendant who had not consented to suit in federal court, then it is also constitutional when applied to a consenting state or private party. Thus, it appears that Justices Stevens, Souter, and Breyer would clearly find the tolling provision constitutional. The remaining six Justices have not yet expressed a view on whether the statute is constitutional when applied to a consenting state or private party defendant. However, they have been overly cautious in reiterating that the question is undecided.[83] *Jinks* was clearly not an extension of the *Raygor* reasoning, so it does not help to clear up the uncertainty of the constitutionality of § 1367(d). Furthermore, no court has yet attempted to determine whether §1367(d) is constitutional when applied to a private party defendant.

IV. ANALYSIS

A. Criticisms of § 1367(d)

The supplemental jurisdiction statute, as a whole, has been the subject of criticism--much of it pointing out various problems, omissions, and ambiguities.[84] However, subsection (d) has not been included in the majority of this criticism.[85] *Jinks* was the first case to hold the statute unconstitutional in over ten years of frequent use by litigants and courts. Additionally, even in *Jinks* the statute was only held unconstitutional as applied to political subdivisions of the state.[86] One explanation for the lack of criticism of the tolling provision could be that many states already have statutes that extend the limitations period for claims filed in federal court and later dismissed without prejudice and refiled in state court.[87] These statutes make the tolling provision of § 1367(d) of little consequence.

However, the attack on § 1367(d) in case law has made the scarce scholarly criticism of the statute suddenly more pertinent. One commentator, Brian Augustus Beckom, adamantly asserts that

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83. *See supra* notes 47-49 and accompanying text.

84. *See* Thomas C. Arthur & Richard D. Freer, *Grasping at Burnt Straws: The Disaster of the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 963 (1991) (arguing that the supplemental jurisdiction statute has created more confusion than it has prevented); Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life After and the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 445 (1991) (same).

85. Section 1367(d) was enacted in 1990, Pub. L. No. 101-650, 104 Stat. 5113.

86. 349 S.C. 298, 304, 563 S.E. 2d 104, 107 (2002).

87. *See, e.g.*, N.M. STAT. ANN. § 37-1-14 (Michie 1978) (six months); N.Y. C.P.L.R. 205(a) (McKinney 1990) (six months); TEX. CIV. PRAC. & REM. CODE ANN. § 16.064(a)(2) (Vernon 2002) (sixty days).

§ 1367(d) is an unconstitutional regulation of state court practice and procedure.[88] The argument is that § 1367(d) requires a state court to hear an otherwise stale claim by extending the period of limitations.[89] However, this assertion appears invalid because if a supplemental state claim is brought in federal court after the applicable statute of limitations has passed, the federal court will apply the state limitations period in accordance with *Erie Railroad Co. v. Tompkins* principles.[90]

In addition, § 1367(d) further serves to reaffirm a state's statute of limitations by ensuring that a claim will not be deemed too stale to be heard if it is properly and timely filed in federal court and then dismissed on grounds unrelated to the substance of the state claim. Contrary to Beckom's argument, the provision actually protects a state's statute of limitations. It seeks to prevent the availability of technical manipulation that would inequitably give a defendant immunity from a claim simply because the plaintiff first chose a federal forum in accordance with the applicable statutory requirements.

Furthermore, because the result is the same as if a plaintiff had first brought the claim in state court, § 1367(d) causes the defendant no unfair prejudice. Defendants receive notice of the claim when the action is first brought in federal court before the limitations period has run. Therefore, a defendant is not surprised when the action is refiled in state court, having become fully aware of the claim since its original filing in federal court. Thus, the purpose of statutes of limitations, to protect "the interests in repose and avoiding stale claims,"[91] is simultaneously preserved.

A variation on the argument that the tolling provision regulates state practice and procedure asserts that *Erie* principles dictate that Congress does not have the power to determine when a state statute of limitations period ends.[92] Such an argument further argues that § 1367(d) does not foster uniformity and, in fact, encourages forum shopping.[93] This contention suggests that a plaintiff who chooses to

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88. *See* Brian Augustus Beckom, Note, *Pushing the Limits of the Judicial Power: Tolling State Statutes of Limitations Under 28 U.S.C. §1367(d),* 77 TEX. L. REV. 1049, 1069-77 (1999).

89. *See id.* at 1069-71.

90. 304 U.S. 64, 78 (1938) (holding that federal courts sitting in diversity must apply state law).

91. Sun Oil Co. v. Wortman, 486 U.S. 717, 736 (1988) (Brennan, J., concurring).

92. Beckom, *supra* note 88, at 1074.

93. *Id.* at 1075. The commentator suggests a hypothetical in which a state claim is dismissed on "procedural grounds" and the tolling statute is used to allow the plaintiff to refile in state court after the statute of limitations has run. Section 1367(d) is not used to protect state claims that are improperly brought wherever they are filed.

bring all claims arising out of the same transaction or occurrence in federal court is forum shopping because the limitations period for his state claims may be lengthened if the claim giving the federal court jurisdiction is dismissed.[94] The federal court may choose to dismiss the state claims, and § 1367(d) allows the plaintiff to refile them in state court, even if the statute of limitations period has run.[95] While it is true that the limitations period is technically extended in such a situation, this is the very way that § 1367(d) actually ensures uniformity and discourages forum shopping. If the plaintiff had originally filed the claim in state court, the statute of limitations issue would never arise because there would be no reason to dismiss the state claims. Therefore, the result would be the same for both the plaintiff and the defendant whether the case was originally filed in state court or filed first in federal court and later refiled in state court pursuant to § 1367(d). The tolling provision clearly does not deviate from the *Erie* principle that precludes a federal court from giving a state-created claim longer life than the claim would have had in state court.[96]

The presence of the tolling provision allows plaintiffs to have a federal court adjudicate matters of federal jurisdiction without fear that they may lose a state claim if their federal claim is dismissed. This is the very reason why the tolling provision is fundamental to one of the chief purposes of the supplemental jurisdiction statute. The tolling statute encourages plaintiffs to bring their federal claims in federal court by preserving their state claims, even if the federal claim is dismissed.[97] Thus, plaintiffs seeking a federal forum for federal questions may bring all their claims in one lawsuit without fear of losing their state claims. Without this rule, plaintiffs would be forced to either choose the expensive and time consuming route of filing two separate lawsuits in state and federal court or to bring all of their

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If there is a procedural defect, the state claim is dismissed for reasons other than those listed in § 1367(c) and the tolling provision would not apply. However, even if this situation occurred and the courts interpreted § 1367(d) to apply, it still would not encourage forum shopping because there is no motive for a plaintiff to purposely use a procedural defect in federal court to try to get to state court. A plaintiff that wanted to bring a claim in state court would simply cure the defect and file originally in state court.

94. *Id.*

95. *See id.*

96. Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530, 533-34 (1949) (finding that it would be inconsistent to give a state cause of action longer life in federal court than it would have had in state court).

97. *See generally* Scarfo v. Ginsberg, 817 So. 2d 919, 921 (Fla. Dist. Ct. App. 2002) (finding that "[t]he purpose of th[e] tolling provision is undoubtedly to allow claimants to pursue their federal claim in a federal court without cost to their state law claims, should the federal claim prove unsuccessful").

claims in state court. The average plaintiff would likely choose to bring one suit in state court to avoid costs, so state courts would likely become the dominant interpreters of federal law.

It is important to distinguish the above analysis from the situation in which the statute of limitations expires during the pendency of a diversity case that subsequently is dismissed for lack of diversity. In this situation, § 1367(d) would not apply to toll the state statute of limitations for any of the claims in the case. In order for § 1367(d) to apply, the federal court must start with original subject matter jurisdiction.[98] If at any time the court finds that it never had subject matter jurisdiction, then it must dismiss the case. If original subject matter jurisdiction is based on diversity jurisdiction, and the court subsequently finds that the parties lack diversity, then the federal courts may not toll the limitations period of the claims because they never possessed jurisdiction.[99] In contrast, if original jurisdiction is based on a federal question, the federal courts have proper subject matter jurisdiction over the claim, even if it is eventually dismissed. Furthermore, the courts can exercise supplemental jurisdiction over the other claims arising from the same transaction or occurrence because § 1367 allows this when the court has original subject matter jurisdiction.[100] The federal court's original subject matter jurisdiction is fundamental to any supplemental claims. Thus, if the court never possessed original jurisdiction, as in the diversity example, then the court never had jurisdiction over the supplemental claims and § 1367 never applied.

The tolling provision is also important in that it seeks to minimize confusion by allowing courts to dismiss the entire case when the federal question has been dismissed.[101] This allows states to adjudicate

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98. 28 U.S.C. § 1367(a) (2000).

99. 28 U.S.C. § 1367(b) (stating the rules for supplemental jurisdiction when the federal court's jurisdiction is based solely on diversity of citizenship).

100. *See* 28 U.S.C. § 1367(a) (providing for supplemental jurisdiction in broad terms to give the courts flexibility to hear an entire case).

101. *See generally* Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 357 (1988) (holding that a federal district court may remand a case to state court, as opposed to dismissing it, if it was originally filed in state court but removed by the defendant on federal question grounds and the federal claims have since been dropped). *Cohill* was decided prior to the supplemental jurisdiction statute's enactment, see Pub. L. No. 101-650, 104 stat. 5113, and discussed the inequity caused when state claims are lost due to a dismissal of federal claims in federal court after the limitations period for the state claims has run. *Cohill*, 484 U.S. at 352. In addition, *Cohill* notes that the possibility of losing the state claims promotes the undesirable effect of persuading plaintiffs to decline to allege their federal claims in order to avoid possible removal and then the possibility of losing their supplemental state claims if the claim giving federal jurisdiction is dismissed. *Id.* at 352 n.9. Thus, though § 1367(d) is not limited to cases

cases in which the issues have become solely those of state law. Though the federal courts may technically retain jurisdiction over the state claims even after the claim giving the court original jurisdiction has been dismissed,[102] the courts generally decline to exercise this jurisdiction, particularly when the federally sufficient claim is dismissed or voluntarily discontinued early in the proceeding.[103] However, without § 1367(d) it is likely that the courts would often maintain jurisdiction over the state claims to prevent the inequity that would occur if a plaintiff lost all of his claims merely because the claim giving federal jurisdiction was dismissed. Not only would this result be an inefficient use of the federal courts' time and resources, but it would also prevent state courts from deciding cases between non-diverse parties whose only issues are based on state law. This is likely the reason that many states have chosen to extend the limitations period in the identical situation by state statute.[104]

The argument against § 1367(d) that has the greatest thrust is the idea that Congress simply exceeded its constitutional power by enacting the provision.[105] This argument asserts that the power to extend state limitations periods for state claims when a district court has declined to exercise jurisdiction over properly and timely filed claims is not necessary and proper for Congress to regulate federal jurisdiction.[106] If this assertion is true, then the power to extend statutes of limitation is reserved to the states, according to the Tenth Amendment.[107] One should recall that this is the reasoning applied by the South Carolina Supreme Court in *Jinks*.[108] Though the United

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that have been removed to federal court, the reasoning of *Cohill* applies despite the difference in where the plaintiff originally brought the case. If this reasoning were not used, the result would limit the plaintiffs choice of a forum for litigating a federal claim and would allow defendants to choose federal or state court through their removal power. As a practical matter, if the defendant does choose to remove and the federal claims are subsequently dropped or dismissed, the case will most likely be remanded, and the parties will continue to litigate the state claims in state court. Therefore, the entire process yields the same result as the tolling provision provides.

102. 28 U.S.C. § 1367(c) (providing that "[t]he district courts *may* decline to exercise supplemental jurisdiction over a claim under subsection (a) if . . . the district court has dismissed all claims over which it has original jurisdiction") (emphasis added).

103. *See* Bradenburg v. Hous. Auth. of Irvine, 253 F. 3d 891, 900 (6th Cir. 2001) (finding that "the usual course is for the district court to dismiss the state-law claims without prejudice if all the federal claims are disposed of on summary judgment").

104. *See supra* note 87 and accompanying text.

105. *See* Beckom, *supra* note 88, at 1069.

106. *Id.*

107. U.S. CONST. amend. X (reserving for the states and to the people any powers not expressly delegated to the federal government).

108. *See supra* notes 63-72 and accompanying text.

States Supreme Court should use the same Tenth Amendment analysis when faced with the question of whether § 1367(d) is unconstitutional when applied to a private party, the remainder of this Comment will show why the Supreme Court should reach a different decision than the South Carolina court in *Jinks*.

B. The U.S. Supreme Court Should Find that § 1367(d) Is Constitutional

It is elementary that Congress must have constitutional authority before enacting any law. The Court has previously recognized that Congress has the power to make laws regulating the federal judiciary's practice and procedure through Article III and the Necessary and Proper Clause.[109] Thus, to analyze whether Congress had the power to enact the tolling provision, the first question must be whether the provision is necessary and proper to regulate federal practice and procedure.

"Necessary" for constitutional purposes has been interpreted to mean not absolutely required but merely "convenient, or useful, or essential to another."[110] Certainly, § 1367(d) is, at the very least, convenient and useful to the regulation of federal practice because it addresses practical concerns that the exercise of supplemental jurisdiction presents.[111] Even the court in *Jinks* conceded that the provision "governs federal practice and procedure as it eliminates the need for federal judges to retain supplemental claims which would be dismissed as stale if pursued in state court" and "the tolling provision also affects federal practice as it allows litigants to pursue actions in federal court without giving up access to state court in the event the federal jurisdictional basis is determined not to exist."[112]

However, the South Carolina Supreme Court found that the statute was an improper interference with a state's sovereignty when applied to the state and its political subdivisions.[113] At least one commentator has also suggested that § 1367(d) is an improper violation of state

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109. *See* Hanna v. Plumer, 380 U.S. 460, 472 (1965) (declaring "[f]or the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts").

110. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 413-15 (1819).

111. *See supra* note 97 and accompanying text.

112. 349 S.C. 298, 304, 563 S.E. 2d 104, 107 (2002), *cert. granted*, 123 S. Ct. 435 (2002) (citing Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis*, 24 ARIZ. ST. L.J. 849, 983 (1992)).

113. *Id.*

sovereignty, but such an argument is circular.[114] The argument seeks to prove that the tolling provision is an unconstitutional violation of state sovereignty protected by the Tenth Amendment.[115] To prove this contention, it is argued that Congress lacks authority under the Necessary and Proper Clause to make such a provision because it is an improper violation of state sovereignty, yet such a position can not be defended.[116] Neither Beckom nor the Supreme Court has defined exactly where Congress's authority stops and state sovereignty begins. State sovereignty is not violated simply because Congress regulates an area that a state previously or currently regulates. In fact, there are areas in which both the federal government and the states may regulate, and, in these areas, Congress is free to preempt the state regulations, pursuant to the Supremacy Clause, when necessary.[117]

The *Jinks* court also used the doctrine of sovereign immunity to support its holding that § 1367(d) interferes with state sovereignty.[118] However, it is clear that political subdivisions are not protected in federal court by Eleventh Amendment sovereign immunity.[119] In addition, the South Carolina Tort Claims Act now provides that "the State, its agencies, political subdivisions, and other governmental entities are 'liable for their torts in the same manner and to the same extent as a private individual under like circumstances' subject to certain limitations," such as the statute of limitations.[120] It naturally follows that neither the state nor its political subdivisions can claim sovereign immunity if they are to be treated as private individuals under the state's Tort Claims Act. Despite this, the *Jinks* court concluded that "[§] 1367(d) potentially exposes political subdivisions to litigation and liability after the limitations period established by the State has expired."[121] This statement is false for the same reasons that § 1367(d) does not expose private defendants to liability for any longer

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114. Beckom, *supra* note 88, at 1069 (alleging that § 1367(d) "undermines many of the central principles of state sovereignty that are contained in the Constitution and set forth in Supreme Court decisions").

115. *Jinks*, 349 S.C. at 304, 563 S.E. 2d at 107; Beckom, *supra* note 88, at 1069.

116. *See id.*

117. The federal and state governments have several areas in which they may both regulate, often due to the federal government's commerce power and state government's police power. Examples include the taxing power, as well as the areas of commerce and education.

118. 349 S.C. at 306, 563 S.E.2d at 108.

119. *See* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280-81 (1977) (holding that political subdivisions are not entitled to Eleventh Amendment sovereign immunity).

120. *Jinks*, 349 S.C. at 306, 563 S.E.2d at 108 (quoting S.C. CODE ANN. § 15-78-40 (Law. Co-op. 1976)).

121. *Id.*

than they would be subject to liability if the plaintiff had originally filed a claim in state court.[122] In addition, defendants receive notice of the impending claim at the same point of time, regardless of whether the claim is originally filed in state court or first brought in federal court and later refiled in state court pursuant to § 1367(d).[123] Thus, the final result is the same whether a plaintiff originally files in state or federal court. If claims are brought within the appropriate limitations period, political subdivisions cannot be distinguished from private defendants simply because claims against political subdivisions are subject to a shorter statute of limitations.

When faced with the issue of whether § 1367(d) is constitutional when applied to a private party, the U.S. Supreme Court should find that Congress was within its power to enact § 1367(d) because it is necessary and proper to Congress's power to regulate federal practice and procedure. It is clear from the dissenting opinion in *Raygor* that Justices Stephens, Breyer, and Souter will find the tolling provision constitutional.[124] Those Justices argued in *Raygor* that, in order to promote the federal interest in the fair and efficient administration of justice, Congress may occasionally impose burdens on the state and their judiciaries.[125] This power is derived from the Supremacy Clause of the Constitution.[126] If the Justices felt that § 1367(d) was a valid exercise of this power when applied to nonconsenting state defendants, it follows that they will find the same to be true when the statute is applied to private parties.

Justice Ginsburg's concurring opinion in *Raygor* also suggests that she will join the dissenting Justices when the constitutionality of § 1367(d) was questioned as applied to private defendants.[127] Justice Ginsburg wrote a separate concurring opinion to reemphasize her reasons for joining the Court's judgment. She declined to "venture further into the mist surrounding § 1367"[128] and agreed with the Court's limited holding that § 1367(d) simply does not apply to nonconsenting state defendants under the reasoning "that statutes should be construed so as to avoid difficult constitutional questions."[129]

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122. *See supra* notes 92-96 and accompanying text.
123. *See supra* notes 94-96 and accompanying text.
124. *See supra* notes 50-54 and accompanying text.
125. 534 U.S. 533, 549-55 (2002) (Stevens, J., dissenting).
126. *Id.* at 549-50.
127. *See supra* notes 48-49 and accompanying text.
128. *Raygor*, 533 U.S. at 549 (Ginsburg, J., concurring).
129. *Id.* (citing Vt. Agency of Natural Res. v. United States, 529 U.S. 765, 787 (2000)).

In addition to writing a separate concurring opinion in *Raygor*, Justice Ginsburg has previously acted as though she will join the dissent in *Raygor* when the Court is asked to decide whether § 1367(d) is constitutional as applied to a private party. For instance, she joined Justices Stevens, Souter, and Breyer in a dissent to *Alden v. Maine*.[130] In *Alden* the Court found that "the immunity of a sovereign in its own courts has always been understood to be within the sole control of the sovereign itself."[131] The *Jinks* court relied on *Alden* for support in concluding that states had the power to determine when the state and its political subdivisions could be sued.[132] Justice Ginsburg will likely disagree with the court in *Jinks* because she dissented in *Alden*. Furthermore, it is even more likely that she will similarly disagree with broadly extending sovereign immunity to apply to political subdivisions of the state. Thus, it naturally follows that Justice Ginsburg will not agree with a decision that uses the state sovereignty doctrine to hold § 1367(d) unconstitutional.

Therefore, it seems predictable that Justices Ginsburg, Stephens, Breyer, and Souter will uphold § 1367(d) as constitutional when applied to private parties. Although the *Raygor* decision seems to imply that the remaining Justices will agree with the *Jinks* court on the theory of sovereignty, it bears reminding that the cases are easily distinguishable. The *Jinks* decision dealt with political subdivisions of the state as defendants while *Raygor* dealt with the actual State as a defendant.[133] Similarly, the *Jinks* decision can be distinguished from *Raygor* because the state had consented to suit in *Jinks*, while in *Raygor* the state had never consented to suit in federal court.[134] In addition, the decisions rested on completely different reasoning and relied on different constitutional amendments in their holdings.[135]

There are several reasons why at least one of the remaining five Justices should join in upholding the constitutionality of § 1367(d). First, the tolling provision is necessary to the efficiency of the supplemental jurisdiction statute. Though the statute has been criticized as poorly drafted,[136] commentators do not seem opposed to the operation of supplemental jurisdiction.[137] This is most likely

130. 527 U.S. 706 (1999).

131. *Id.* at 749.

132. Jinks v. Richland Co., 349 S.C. 298, 305, 563 S.E.2d 104, 107, *cert. granted*, 123 S. Ct. 435 (2002) (citing *Alden*, 527 U.S. at, 749).

133. *Raygor*, 534 U.S. at 548; *Jinks*, 349 S.C. at 304, 563 S.E. 2d at 106.

134. *Raygor*, 534 U.S. at 548; *Jinks*, 349 S.C. at 306, 563 S.E. 2d at 108.

135. *See supra* notes 43-47, 62-72 and accompanying text.

136. *See supra* note 84.

137. *See* Arthur & Freer, *supra* note 84 (criticizing the supplemental jurisdiction as a whole, but putting decidely less emphasis on subsection (d)).

because the policy reasons behind the passage of the statute are still viable today. Without supplemental jurisdiction, plaintiffs who wanted a federal forum for federally created rights would have to bring federal question claims separately from state law claims that arose out of the same transaction or occurrence. This result is inefficient for both the state and federal judiciaries. If plaintiffs instead chose to combine all their claims in a state court action, then state courts would be forced to be the dominant interpreters of federal questions, resulting in a lack of uniform federal law. The inconsistent interpretations of federal laws would be a poor reflection of the judicial system and would provide little guidance for parties seeking to comply with those laws.

Another reason for upholding § 1367(d) is that the application of the statute causes the states little prejudice. The state's statute of limitations still originally determines if a claim has been timely filed. A key purpose behind limitations periods is to protect defendants from suits involving injuries that occurred too long ago in the past. The tolling statute of § 1367(d) preserves this purpose and does not allow a defendant, who has not received notice,[138] to be brought into court long after he has caused an injury. The tolling provision may only be applied when a defendant has received notice as timely, as he would have if the claim had been originally brought in state court.[139] In addition, the state legislatures maintain the power to decide how long to allow the statute of limitations to be. Therefore, the impact on the defendant and the burden imposed on the states because of § 1367(d) is minimal.

Furthermore, if § 1367(d) is found to unconstitutionally violate state sovereignty when applied to a private party, then there are certainly many other federal statutes that should be quickly attacked. There are other federal tolling statutes that apply to state limitations periods.[140] If § 1367(d) is found to violate state sovereignty, then all of these statutes will also be vulnerable. There are also many federal statutes that impose burdens on the states and their judiciaries to achieve the fair and efficient administration of justice.[141] These statutes would similarly be threatened if the Court held that the tolling provision violated state sovereignty. Thus, there are practical reasons

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138. *See Raygor*, 534 U.S. at 550 (Stevens, J., dissenting) (declaring that "[t]he impact of [§ 1367(d)] on the defendant is minimal, because the timely filing in federal court provides it with the same notice as if a duplicate complaint had also been filed in state court").

139. *See supra* notes 95-96 and accompanying text.

140. *See Raygor*, 534 U.S. at 551 n.7 (Stephens, J., dissenting).

141. *See id.* at 554 nn.14-15.

why members of the Court should uphold the constitutionality of § 1367(d).

In addition, using only the Tenth Amendment to strike down a federal law has rarely been successful.[142] The cases that have successfully invoked the Tenth Amendment to strike down a law have held that Congress cannot compel a state branch of government to act in a certain way to carry out a federal law.[143] Section 1367(d) does not require such action by the state. The state still determines the claims it will hear. The tolling provision simply ensures that a state claim originally filed in federal court will have the same life that it would have had if it had been originally filed in state court. Because the Tenth Amendment is not usually used to strike down a federal law, unless it is a clear invasion of state sovereignty, and because § 1367(d)'s interference with state law is minimal, if at all, it is unlikely that any of the Justices will use the amendment to hold § 1367(d) unconstitutional. In any event, it is especially likely that at least one of the Justices who joined in the majority opinion of *Raygor* should and will join the concurring and dissenting Justices from the opinion to gain a majority holding that § 1367(d) does not violate the Tenth Amendment when applied to private defendants and is, therefore, constitutional.

V. CONCLUSION

Section 1367(d) is necessary and proper to Congress's power to regulate the federal courts' practice and procedure. Its burden on states is minimal, and it preserves the states' power to determine how long a plaintiff has to bring a claim. Furthermore, it aids federal supplemental jurisdiction and increases uniformity between state and federal forums. Clearly, the tolling provision is not only extremely useful, if not absolutely necessary, to modern federal practice and procedure, but, more importantly, it is constitutional. As demonstrated, a majority of the Supreme Court should and will likely agree.

Any result other than finding the statute constitutional when applied to a private defendant would have serious implications on dozens of other statutes that impose greater burdens on the states and are less useful to exercising an enumerated power of Congress. As with any constitutional question, the decision whether to strike a law

142. The Court expressed its reluctance to use the Tenth Amendment to strike a law in the 1985 case, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

143. *See* Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992).

as unconstitutional has far greater significance than the boundaries of that particular case. Thus, the grounds for finding § 1367(d) constitutional are many-fold, and the bases for failing to are few.

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